No. 2614

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PAUL SCHARRENBERG,
Plaintiff in Error,

vs.

THE DOLLAR STEAMSHIP COMPANY, et al.,
Defendants in Error.

PETITION FOR A REHEARING

H. W. HUTTON,
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Filed this.....day of March, 1916.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

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To the Honorable the above-entitled Court, and to the Judges thereof, Paul Scharrenberg, the plaintiff in error, respectfully petitions for a reconsideration of the above cause, and for reasons why the same should be granted, presents the following:

The case is one of great national importance, as it not only affects ships, but also sailors. The merchant marine has hitherto made experienced sailors; there is and has been no other school; from them develop all of the masters and other officers of vessels, without the opportunity of men first serving as seamen on merchant vessels. There will be no opportunity of obtaining officers for them. The men in this case were shipped to work on

coasting voyages in part, and under the decision of this Court herein, there will be nothing to prevent any shipowner from bringing Chinese to this country, and manning every vessel in the coasting trade with them. This Court has held that a vessel so manned is unseaworthy; the result of such importations will result in giving us a merchant marine of unseaworthy ships. Again to the merchant marine we have always looked in the past for sailors to man our warships. The hardships hitherto suffered by sailors on American merchant vessels, greater than those of any other nation, has produced the condition that our war vessels are about one-third manned, as we have no American sailors, in the event of war they would be one-third manned. It is possible that the glamor of war might induce some few to enlist, but it is doubtful if our navy would ever be made more than half manned, even with that stimulus to enlistment. If all our merchant ships can be manned with Chinese, where are we to get our sailors and officers for vessels?

Why again should seamen as a class be brought into direct competition with Asiatics when no other class are? *Congress has not in the statutes said they should be,* and why should the exceptions in the statute be extended against them when they are extended against no other class?

The rule of statutory construction in the case of exceptions is clear and well understood. The U. S. Supreme Court has defined what it is. We quote from *Kendall* vs. *United States,* 107 U. S. 123:

> "125. And that there might be no misapprehension as to the intention of Congress, the statute, after enumerating the cases to which the limitation of six years shall not apply, declares that 'no other disability than those enumerated shall prevent any claim from being disbarred.' *The court cannot superadd to those enumerated*, a disability arising from the claimant's inability to truthfully take the required oath. *It has no more authority to engraft that disability upon the statute* than a disability arising from sickness, surprise, or inevitable accident, which might prevent a claimant from suing within the time prescribed."

The language in this statute is general, with exceptions, the rule under such a statute is clearly stated in *Lewis Sutherlad Statutory Construction*, 2 Ed., Sec. 494:

> "An express exception, exemption or saving excludes others. Where a general rule has been established by statute with exceptions the court will not curtail the former nor add to the latter by implication. * * * * * The expression of one thing is the exclusion of another; and consequently no further exception was intended."

And also in *Wabash R. R. Co.* vs. *United States*, 101 C. C. A. 133:

> "But the power was conferred and the duty was imposed upon the members of Congress, and not upon the courts, to determine whether or not these exceptions to the express terms of the proviso should be made. They did not make them, *and that fact raises a conclusive presumption that they did not intend to make them, and it is not in the province of the courts to do so.* * * * * * (many cases cited.)

The case of the Holy Trinity Church does not lend any sanction whatever to the extension of exceptions. The Court elaborately and with its usual learning *ascertained the meaning of the language of the statute itself* by analyzing the language, and the intent of Congress from its debates, and determined that a minister of the gospel did *not perform labor or service within the meaning of the terms* labor and service, and that Congress so understood their meaning, as is hereafter shown.

The language of Section 33 is general, there are no exceptions in that section, which exclusively shows that Congress never intended there should be any. We take the liberty of quoting further from the case of the *Chinese Waiter,* 13 Fed. 289.

In that case, to show that a Chinese person was always within the United States, when serving as a seaman on an American vessel, and to show that he was not therefore subject to the terms of the exclusion Act, it is properly stated:

> "And in this connection it should not be overlooked that the petitioner while on board the steamship as one of its crew *was within the jurisdiction of the United States, at all times* under the protection and amenable to their laws. An American vessel is deemed to be a part of the territory of the United States, *the rights of its crew are measured by the laws of the state or nation,* and their contracts are enforceable by its tribunals."

The above language is general, and certainly applies as much to the converse of the facts in that case as it does to the facts as they were therein.

Judge Field never intended that language to be applied to a case of where a Chinese was endeavoring to establish his right to stay within the United States, *and it not to apply* where the same rule of law was invoked for the purpose of endeavoring to keep him out.

I.

Is a Sailor's Home on the Sea?

If a sailor's home was on the sea, it would seem that that would be an additional reason for affording him the protection that all others are entitled to, for as a whole they are not able to be here and watch the passage of the statutes.

But his home is no more on the sea than is the home of internes in hospitals, employees in a hotel, or any other person who happens to sleep where he earns his living.

The ship he sails on has a *home port,* is required by law to have one, and the very worst that can be said against the sailor is that his home is the same home that the vessel that he temporarily sails on has, but even that will not suffice under the ordinary construction of language. The law requires, Sec. 4511 Revised Statutes, that Shipping Articles shall contain:

> "2. The number and *description of the crew,* specifying their respective employments."

The description of a man is who he is and where he belongs, and shipping articles always contain such information. The very fact that the provisions

of the Shipping laws provide for the paying off of a sailor show that *his home* is not on the vessel, but simply a place of temporary occupation.

Home, is defined in an *Immigration law case* to be:

Ex parte Petterson, 166 Fed. 545.

> "The domicile of a person, in a strict legal sense, is where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. Story on Conflicting Laws, 8th Ed., Sec. 41. It has been said that no one word in the English language is more nearly synonymous with the word 'domicile' than our word *'home.'* (Cases cited.)

In that case a woman who came to this country and lived in a place of prostitution, was held not to have acquired a home because she could not have intended to permanently stay there. No sailor that ever lived ever intended to permanently stay on any one vessel, or on the sea. Many vote, many are married, they almost all have places of abode on land, they all in common with all of us have a place of birth on land, and in the absence of any other home that would be his home. But if a sailor's home was on the sea, what difference should it make? He is as much entitled to protection against unjust competition as any other class; *so are ship-owners, who cannot bring in Asiatic labor.*

A man's home is his habitual abode, not the place that he temporarily goes to to enable him to earn a living.

II.

There Is No Room for the Extension of the Exceptions in This Case.

Let us now consider the law, its history, and the previous decisions of the courts upon it.

The law as first enacted read, Act of February 26, 1885:

> "That from and after the passage of this act it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien, or aliens, and foreigner or foreigners, into the United States, its Territories, or the District of Columbia, under contract or agreement, parole or special, express or implied, made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to *perform labor or service of any kind* in the United States, its Territories, or the District of Columbia.

It was that law the U. S. Supreme Court had under consideration in the Holy Trinity Church case. Let us see what it said and did. 143 U. S. 457:

> "462. Among other things which may be considered in determining the intent of the legislature is the title of the act. * * * * * 463. Now, the title of this act is, 'An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to *perform labor* in the United States, its Territories and the District of Columbia. Obviously, the thought expressed in this *reaches only to the work of the manual laborer as distinguished*

> *from that of the professional man.* No one reading such a title would suppose Congress had in its mind any purpose of staying the coming into this country of ministers of the gospel, or, indeed, of *any class whose toil is that of the brain. The common understanding of the term labor and laborers does not include preaching and preachers;* and it is to assume that words and phrases are used in their ordinary meaning. *So whatever light is thrown upon the statute by the language of the title* indicates an exclusion from its penal provisions of all contracts for the employment of ministers and pastors."

There is no room for questioning the soundness of that reasoning, nor is there of the language of the Act itself.

Labor has been correctly defined in the above language, and service usually means persons at service.

The decision was rendered February 29th, 1892. March 3rd, 1891, Congress amended the Act of 1885. (The hiring of Warren in the Trinity Church case, took place September, 1887) and Congress added the following:

> "Sec. 5. That section five of said act of February twenty-sixth, eighteen hundred and eighty-five, shall be, and hereby is, amended by adding to the second provision in said section the words '*nor to ministers of any religous denomination,* nor persons belonging to any recognized profession, nor professors for colleges and seminaries,' and by excluding from the second of said section the words 'or any relative or personal friend.' "

It will be seen that Congress amended the section after the Circuit Court held that the ministers were within the law (36 Fed. Rep. 303), to wit: while it was pending in the U. S. Supreme Court it was amended in the particulars above mentioned to show *that it had not intended to include ministers of the gospel at any time.*

The title of the Act of March 3, 1891, read:

> "An Act in amendment to the various acts relative to immigrants and the importation of aliens under contract or agreement to perform labor."

Subsequent to that Congress again passed a law known as the Act of March 3, 1893. The title to that Act read:

> "An Act to facilitate the enforcement of the immigration and *contract-labor* laws of the United States."

There was very little in that law about the contract labor law, but in 1903 Congress again passed a law into which it incorporated all of the immigration laws, including the contract labor law.

Section 4 of that Act read:

> "Sec. 4. That it shall be unlawful for any person, company, partnership or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any *alien* into the United States, in pursuance of any offer, solicitation, promise, or agreement, parole or special, express or implied, made previous to

> the importation of such *alien* to perform labor or service of any kind, *skilled or unskilled,* in the United States."

Section 2 of that Act read in part:

> "That skilled labor may be imported, if labor of like kind unemployed cannot be found in this country. And provided further, that the provisions of this law applicable to contract labor shall not be held to include *professional actors, artists, lecturers, singers, ministers of any religious denomination, professors for colleges or seminaries, persons belonging to any recognized learned profession, or persons employed strictly as personal or domestic servants.*"

The next Act and the one in question in this case was passed February 20, 1907. Its title was "An Act to regulate the immigration of aliens into the United States."

That Act seems similar to the other laws, excepting only that the word alien seems to be generally omitted in the body of the Act.

The particular significance of that law, however, as applicable to this case, is the fact that after all of the foregoing amendments, Congress inserted a section which reads:

> "Sec. 4. That it shall be a misdemeanor for any person, company, partnership or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States, *unless such contract laborer* or

> contract laborers *are exempted under the terms of the last two provisions contained in section two of this act.*"

It is very clear from the language that Congress knew what it intended, and fully understood what exceptions it wanted. It specified the exceptions, it specified the classes of persons that it did not intend the Act to cover, *and sailors are not included in the exception, and vessels are not excluded from the provisions of Section 33 of the Act.*

The exceptions are:

> "That skilled labor may be imported if labor of like kind unemployed cannot be found in this country. And provided further, That the provisions of this law applicable to *contract labor* shall not be held to exclude *professional actors, artists, lecturers, singers, ministers of any religious denomination, professors for colleges or seminaries, persons belonging to any recognized learned profession, or persons employed strictly as personal or domestic servants.*"

As to contract labor, sailors are not within the excluded list, and the principle of law, *expressio unius est exclusio alterius*, unquestionably applies, if Congress had intended to include sailors, as not within the contract labor law, in the light of the various amendments to the law, which, of course, were had after years of elaborate discussion, *it would undoubtedly have said so.*

> "Sec. 33. That for the purposes of the Act the term 'United States' as used in the title, as well *as the various sections* of this Act shall be

> construed to mean the United States and any waters, territory, *or other place subject to the jurisdiction thereof,*" * * *

We find no mention there of any exclusion of vessels from the operation of the contract labor part of the Act.

It is very clear that the case of the Holy Trinity Church cannot be used to excuse the contract and transportation in this case, for the reason that the law has been frequently amended and all the Supreme Court did was to decide that the Act as it was then in question, prohibited the importation of those under contract to perform *labor or service,* and it was very properly held that a minister of the gospel did neither.

The Act now reads, "To *perform labor* in this country of any kind, *skilled or unskilled.*" And it is very clear, that the men in question in this case did perform labor of one of those kinds.

Another proof of the purposes of the Act showing that the above-mentioned case cannot be used to extend the exceptions in this case, is found on page 464 of 143 U. S.:

> "A singular circumstance, throwing light upon the intent of Congress, is found in this extract from the report of the Senate Committee on Education and Labor, recommending the passage of the bill. * * * * *
>
> The committee, however, believing that the bill in its present form will be construed *as including only those whose labor or service is*

> *manual in character*, and being desirous that the bill become a law before the adjournment, have reported the bill without change."

That language shows clearly the correctness of the ruling of the U. S. Supreme Court, and just as clearly that the case cannot be applied to this, these men were performing manual labor.

III.

The Purposes of the Act.

The above-mentioned case is the best source of information as to the purposes of the Act.

143 U. S. 463:

> "The motives and history of the Act are matters of common knowledge. It had become the practice for large capitalists in this country to contract with their agents abroad for the shipment of great numbers of an ignorant and servile class of foreign laborers, under contracts, by which the employer, upon the one hand agreed to prepay their passage, while upon the other hand, the laborers agreed to work after their arrival for a certain time at a low rate of wages. The effect of this was to break down the labor market and to reduce other laborers engaged in like occupations to the level of the assisted immigrant. The evil finally became so flagrant that an appeal was made to Congress for relief by the passage of the Act in question, the design of which was to raise the standard of foreign immigrants, and to discountenance the migration of those who had not sufficient means in their own hands, or those of their friends, to pay their passage."

The defendants in error in this case had an agent, to wit: a shipmaster in China; very few shipowners

have. They were able in that way to secure a crew for the "Mackinaw" at about one-fifth of the wages that other shipowners had to pay. The sailors on the Pacific Coast were brought into direct competition with such wages; other shipowners could not compete. This Court held in the case of *In re Pacific Mail S. S. Co.,* 130 Fed. 176, that a vessel manned as the "Mackinaw" was with these men was unseaworthy. Congress has given its support to the opinion of this Court in that case, *by now requiring a language test,* in common with many other natures. It is too clear for argument that not only the letter, but the spirit of the Act was violated in this case, and if such acts are persisted in, they will undoubtedly lead to the wholesale importation of Asiatics and manning of all American vessels with Chinese, or some similar Asiatic race, with the final result that we will have unseaworthy vessels, and seamen who make their home in this country will be brought down to the level of the Asiatics, who took their place in this instance.

IV.

The Authorities Cited in the Opinion of the Court Have No Application to This Case.

We respectfully call the Court's attention to the fact that there is a wide distinction between the case of a vessel lying in an American port with a *bona fide crew on board,* where one of them escapes against proper precautions taken by the master, and a case where a vessel lying in a foreign port with a

bona fide crew on board, and another crew is then *shipped for the express purpose of bringing it to this country* and transhipping it to an American vessel. *The latter crew cannot be bona fide,* it was not needed on the "Bessie Dollar," she had one *bona fide crew,* she *could not have two.* When the U. S. Supreme Court used the word *bona fide,* it meant just what it said, and it meant to go no further; that is clearly shown by its own language.

U. S. vs. *Taylor*, 207 U. S. 120, page 127:

> "Of course it is possible for a master unlawfully to permit an alien to land, *even if the alien is a sailor.*"

That language shows that the Supreme Court never intended that case to apply to the whole range of sailor and shipping cases. *But landing is not involved in this case; in that case it was.*

In the Taylor case, the law that it was claimed was violated, read:

> "Sec. 18. That it shall be the duty of the owners, officers and agents of any vessel bringing an alien to the United States to adopt due precautions to prevent the landing of any such alien from such vessel at any time or place *other than that designated by the immigration officers*, and any such owner, officer, agent, or person in charge of such vessel who shall land or permit to land any alien at any time or place other than that designated by the immigration officers, shall be deemed guilty of a misdemeanor, and shall on conviction be punished by a fine for each alien so permitted to land of not less than one hundred nor more than one

> thousand dollars, or by imprisonment for term not exceeding one year, or by both such fine and imprisonment, and every such alien so landed shall be deemed to be unlawfully in the United States and shall be deported, as provided by law."

A man escaped, *in spite of due precautions* in that case; the man was a part of *a bona fide crew* of a foreign vessel, properly lying in the United States. There was no question of his having been signed in a foreign port to compete on his part with the seamen of this country, or unjust competition by the shipowner with other shipowners before the Court. The Supreme Court held that an undue standard of care on the part of the master was set by the verdict of the jury, and in the language above quoted, "even if the alien is a sailor," it showed that it intended its decision to apply to the facts of that case, *and not to any other sailor case,* and certainly not to all sailor cases.

The section under consideration in that case was amended in 1907 to include transportation, and the words "to adopt due precautions" stricken out, so that the Act now reads "to prevent the landing of such aliens," etc., and the word "negligent" inserted, so that the section now reads:

> "and the negligent failure of any such owner, officer, agent to comply, etc."

Showing that Congress intended to extend the Act, undoubtedly in view of the Taylor case.

The case of *U. S.* vs. *Sandrey* was another case where a *bona fide* sailor escaped, and the Court intended that decision to apply to that case and no other, as shown by the following language, page 553:

> "We are not dealing with a case where a vagrant sailor has been brought to this country and discharged in a destitute condition, nor with a case where the master of a vessel has connived with an immigrant within the objectional classes to smuggle him into this country *under cover of shipping articles.*"

There was certainly a smuggling of the prohibited classes into this country *under cover of shipping articles* in this case.

The case of *U. S.* vs. *Burke* was a case where a sailor escaped; he went back on board the vessel again, promised to stay, and the master undoubtedly thought, and had the right to think that he would stay. It was decided under the law of 1891. He escaped again, however, and the vessel was fined $300.00, which the master refused to pay, was denied clearance, and obtained a writ of mandamus to compel clearance. The law at that time read:

> "Sec. 6. That any person who shall bring into *or land* in the United States by vessel or otherwise, *or who shall aid* to bring into *or land* in the United States by vessel or otherwise, any alien not lawfully entitled to enter the United States, shall be deemed guilty of a misdemeanor, and shall, on conviction, be punished by a fine not exceeding one thousand dollars, or by imprisonment for term not exceeding one year, or by both such fine and imprisonment."

The master of that vessel had not landed the sailor and the man in question in that case was undoubtedly entitled to land. *In this case contract laborers are excluded.* He was undoubtedly entitled to come into the United States as a part of a *bona fide* crew of his vessel, the complaint was that the master had *landed him,* which he certainly had not. *The contract labor* parts of the Act were not even indirectly involved in that case.

There is a wide distinction in the cases; the law has since been amended, and Judge Toulmin *passing on a similar state of facts to what exists in this case said:*

> "I have carefully considered the ruling of the assistant secretary of the treasury in the case of the crew of the 'Lancashire,' which may be justified by the facts in that particular case, as they existed, and as they were doubtless made known to him. In that case the vessel which had been partly wrecked on the coast of Jamaica and partially restored there, and had changed flags, came to Mobile for docking and more complete repair; there to load a cargo for foreign trade. She had shipped at Kingston, besides the ordinary crew usually required on vessels of her class, a large number of additional men, who desired to come to the United States, and who were engaged at Jamaica to come to Mobile at a wage of one shilling per month each, to work chiefly at pumping the leaking vessel, and to be discharged; an absurdly small wage for the men.
>
> Under such facts as existed in that case, these men, so working their passage at the equivalent of 25 cents for the month, but who were actually paid $5 each for the month's

> service (where the ordinary wages were $15 per month), and who stipulated for discharge here in the United States, were plainly immigrants, and properly treated as such, and therefore properly deported under the ruling of the secretary, and they, not because at all under the immigration laws, *but because they were not a bona fide crew of the ship.*"

The facts in this case, with the exception of the wages not being mentioned, are identical with that case, and the wages are immaterial.

In Treasury Decision No. 21724, the "Lancashire" case, the Treasury Department said, on the foregoing facts:

> "If a contrary view were taken you will readily see that, by collusion with shipowners, or masters of vessels, it would be quite possible to effect the landing of aliens who are forbidden by law to come to this country, *simply through the device of signing them for the inward trip.*"

It would seem that was what was done on the "Bessie Dollar."

We now respectfully call the Court's attention to other parts of the decision of Mr. Beck, Acting Attorney General, portions of which are quoted in the opinion herein.

Following such quotation is the following:

> "It is important, however, to remember that the salutory immigration statutes cannot be defeated by intending immigrants shipping as sailors. Judge Toulmin recognized this in the decision referred to by expressly approving the

> ruling of your Department in the case of the 'Lancashire.' *Aliens who become seamen on vessels for the purpose of securing an entrance into this country free from the barriers of the immigration statutes are none the less alien immigrants, and can be treated as such.* In my judgment it is not important whether the master of the vessel who ships them was in collusion with them, or knew of their purpose to escape. Only such seamen are excepted from the class of passengers upon whom the head money tax is imposed, and from the class of alien immigrants, as are seamen in good faith and have no intention by reason of their passage to this country to leave the ship and make entry into this country."

This last language is no longer applicable, under the law as it now is, as intention to remain, is not material, as was said in the case of *U. S.* vs. *Taylor,* 207 U. S. 125, page 126:

> "A reason for the construction adopted below was found in the omission of the word *'immigrant'* which had followed 'alien' in the earlier acts. No doubt that may have been intended to widen the reach of the statute, but we see no reason to suppose that the omission meant to do more than *to avoid the suggestion that no one was within the Act who did not come here with intent to remain."*

Further from Mr. Beck's opinion:

> *"It does not follow because aliens are seamen* that they are free from such examination and inspection as you have either required or may hereafter require by regulation. By the immigration statutes Congress intended to exclude undesirable immigrants from entrance to this country, and the law should be interpreted so as to effectuate this object."

Contract laborers are made undesirable by the Act.

For a valuable decision, construing the case of the Holy Trinity Church see the matter of the "Lacemakers," 23 Op. of the Attorney General 381. The Lacemakers in that case were *contract laborers* and held not entitled to admission.

The word "alien" is not now within the statute. It now covers "contract laborers" without regard as to whether they are *aliens* or not, *or whether they come to stay or not.* In the case of *Grant Brothers* vs. *U. S.,* 232 U. S. 647, the men hired were but temporarily here.

In this case also the men were Chinese and without the right to come into the country at all. They were certainly in the United States, when in San Francisco, and when on board the "Mackinaw." See *In re Ross,* 140 U. S. 453.

And the mere bringing of a contract laborer is a violation of the Act whether he stays or not.

It will be seen that all of the cases affecting sailors cited, were decided under an entirely different state of facts to those in this case; that each one contains a reservation as to its general applicability; that an entirely different part of the law was under consideration, and that of necessity, there is a wide difference between the facts of a case where a man on a ship, lawfully in this country

on that ship, escapes, and this case where the defendants deliberately went to a foreign country and contracted with men who had no right to come to this country at all, they being Chinese. That they were in this country and entitled to all of the privileges, and subject to all of the burdens of American seamen, cannot be disputed.

It seems that the decision of this Court herein, if allowed to stand will lead to a very serious and unfortunate state of affairs, and we therefore respectfully submit, that this case should be reconsidered.

Respectfully,

H. W. Hutton,

Attorney for Plaintiff in Error.

I hereby certify, that, in my judgment the foregoing petition for a rehearing is well founded, and that it is not interposed for delay.

H. W. Hutton,

Attorney for Plaintiff in Error.